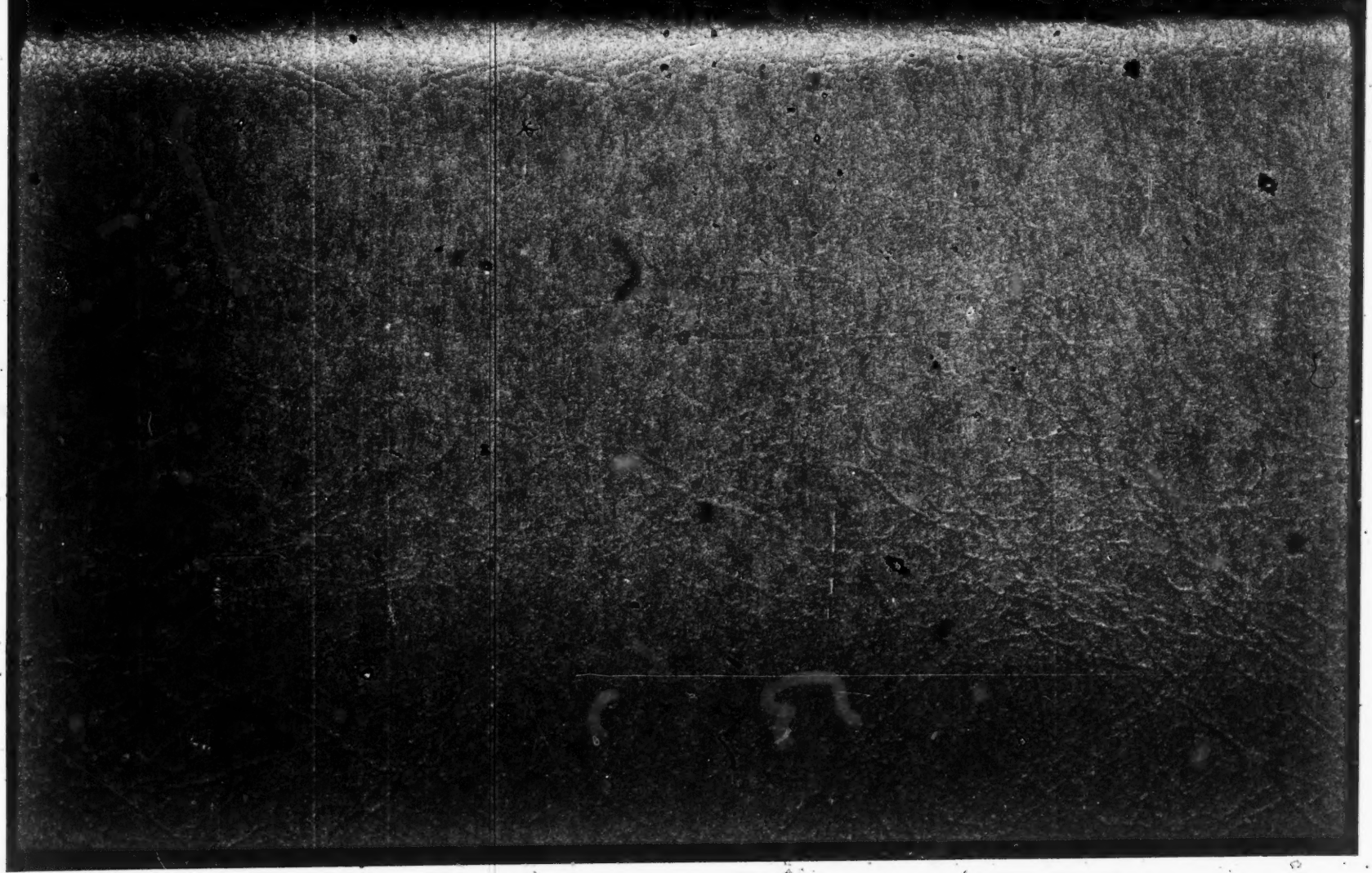

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v.

UNITED STATES OF AMERICA,

[redacted]

BRIEF OF PETITIONER

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Supreme Court of the United States

October Term, 1933

No. 742

BERTHA MEYER SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONER

REVIEW ON WRIT OF CERTIORARI OF DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The District Court of Oregon rendered no opinion but entered findings and gave judgment for petitioner. (R. 23-28.) The opinion of the Circuit Court of Appeals (R. 91-102) is reported in 67 Fed. (2d) 412.

JURISDICTION

The judgment of the United States District Court for the District of Oregon was entered on August 9, 1932 (R. 49-52 C. C. A.-9 and 27-28 Sup. Ct.), and the Findings of Fact and Conclusions of law were

rendered on the same date (R. 43-48 C. C. A.-9 and 23-26 Sup. Ct.) The judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered on November 6, 1933 (R. 102). A petition for re-hearing was denied December 11, 1933 (R. 103). The petition for writ of certiorari was filed in the United States Supreme Court on January 25, 1934 and granted March 5, 1934. Petitioner invokes the jurisdiction of this Supreme Court of the Unites States under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, so that this Court may review and determine this case.

THE QUESTION PRESENTED

The real question presented in this case is whether the War Risk Term Insurance policy issued to Elias Melvin Zimmerman on his application dated December 3, 1917, and on which it appears no premiums were paid after the month of March, 1918 was kept in full force and effect during his continuous active service in the United States Navy from March 18, 1914, to June 30, 1921, during two subsequent re-enlistments without a single day out of active service by reason of an authorization unlimited as to time, for deduction of insurance premiums from active service pay executed during an enlistment extending from March 18, 1914 to March 17, 1918, and not renewed during such continuous subsequent enlistments which authorization

was never revoked in writing and there was always sufficient pay due Elias Melvin Zimmerman to pay the premiums on his insurance, he having continuous service certificate No. 49,689 and he had not been discharged from active naval service of the United States at the time of his death.

STATEMENT OF THE CASE

A jury having been waived the case was tried before the District Court upon the following stipulated facts as shown on Pages 53 to 58 R. C. C. A.-9 and Pages 29-32 Sup. Ct. as follows:

Plaintiff, Bertha Meyer Smith, was the mother of one Elias Melvin Zimmerman, and beneficiary designated in the War Risk Insurance Policy of said Elias Melvin Zimmerman.

That at all times mentioned in the pleadings, the plaintiff was and she now is a citizen of the United States and a resident and inhabitant of the State of Oregon.

Elias Melvin Zimmerman enlisted in the United States Navy on March 18, 1914 at Portland, Oregon, as an apprentice seaman and that he served throughout such enlistment and was honorably discharged therefrom at the expiration thereof on March 17, 1918; that he re-enlisted in the United States Navy on March 18, 1918 and served throughout such enlistment and received an honorable discharge therefrom on Septem-

ber 15, 1919; that he re-enlisted on September 16, 1919, and served thereafter until the date of his death, June 30, 1921.

That Elias Melvin Zimmerman is holder of Continuous Service Certificate No. 49689.

That on the 3rd day of December, 1917, Elias Melvin Zimmerman made application for and was granted a policy of War Risk Insuruance in the amount of $10,000, and that at the time of his application for such insurance, Elias Melvin Zimmermam authorized deductions to be made from his navy pay for the purpose of paying the monthly premiums on his insurance policy in the following words:

> "I authorize the necessary monthly deductions from my pay, or if insufficient, from any deposits with the United States in payment of the premiums as they become due, unless they be otherwise paid."

That deductions were made from the pay of Elias Melvin Zimmerman until the expiration of his first enlistment, by which deductions premiums were paid on his insurance policy to and including the month of March, 1918. That thereafter no further deductions for the payment of insurance premiums were made; no further authority for deductions executed and no further premiums ever paid on such insurance.

That pay was due Elias Melvin Zimmerman for

each and every day from and including March 18, 1914, to the official date of his death, June 30, 1921.

That at the time of his discharge on March 17, 1918, and on September 15, 1919, Elias Melvin Zimmerman was paid all the money then due him by the defendant.

That at the time of his death, June 30, 1921, pay was due Elias Melvin Zimmerman, which was later paid to the plaintiff.

War Risk Circular No. 14, S. & A. Circular letter 121-1920, dated October 20, 1920, was issued by the Navy Department, Bureau of Supplies and Accounts, Washington, D. C., on that date.

That in passing upon the question at issue the Court may consider as evidence the depositions and exhibits previously filed in the case.

The following exhibits were admitted in evidence by Stipulation:

Exhibit 1, Bulletin No. 1, War Risk Insurance Bureau.

Exhibit 2, Application for insurance of Elias Melvin Zimmerman, dated December 3, 1917.

Exhibit 3, Treasury Decision No. 33—War Risk Insurance, dated September 20, 1918.

Exhibit 4, Treasury Decision No. 44—War Risk Insurance, dated May 17, 1919.

Exhibit 5, Treasury Decision No. 48—War Risk Insurance, dated September 29, 1919.

Exhibit 6, Letter of Navy Department, dated May 25, 1921. (Included in Stipulation of Facts.)

Exhibit 7, Letter of Navy Department, dated July 8, 1921. (Included in Stipulation of Facts.)

IT WAS FURTHER STIPULATED that a disagreement existed between plaintiff and defendant.

Thereafter the following proceedings were had:

MR. KIMMELL: The record shows there was deduction for the first enlistment for premiums.

COURT: I think the service should be considered as continuous. The question is whether the Government should have deducted the premiums. Of course, payments made to the month after his death would be after the policy had matured. I think you should tender the amount of the premiums, whatever they were.

MR. CROSSLEY: Of course, it is over ten years since he lost his life.

COURT: Yes, but up to the time of his death, when the policy matured, to 1921.

MR. CROSSLEY: June 30, 1921. If your Honor please, I think I would like to add an amendment to our complaint. I think there are five paragraphs and the sixth I would like to add, that plaintiff hereby makes tender of all premiums that may have been due,

if any were due, on the 18th day of March, 1918, to the 30th day of June, 1921.

THE COURT: Yes.

IT WAS FURTHER STIPULATED and AGREED that there was one fact only in controversy, namely: was the War Risk Insurance Policy applied for and obtained by Elias Melvin Zimmerman on December 3, 1917, in force and effect and unterminated on June 30, 1921.

The deposition of Lieutenant Walter Dismukes, taken and filed on behalf of the defendant in Washington, D. C., on December 2, 1929, in addition to the matters stipulated and agreed upon, was in substance as follows:

I am at present in charge of the retainer division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C., and in such capacity have access to the records relating to enlisted men in the United States Navy; that I have searched such records for the purpose of ascertaining what was disclosed by the records of the enlistments of Elias Melvin Zimmerman. The Navy Department records relating to Elias Melvin Zimmerman, disclose that he never made any allotment for War Risk Insurance Premiums other than the authorization for deduction of premiums at the time of his application for insurance.

I further examined the records of the enlisted

personnel aboard the United States Ship "Conestoga" with reference to Elias Melvin Zimmerman, and found that the record shows that twelve members of the crew of that ship executed allotments for the payment of premiums on War Risk Insurance, but that no allotment was executed by Zimmerman.

ASSIGNMENTS OF ERROR INTENDED TO BE URGED

The Circuit Court of Appeals erred:

I. In reversing the District Court and in holding that the contract of insurance on the sailor's application for insurance ended with the enlistment in which it was made or any subsequent re-enlistment when the sailor had unbroken continuous service every day for over seven years, was the holder of a continuous service certificate No. 49,689, and his contract for insurance was separate from his enlistment contract.

II. In holding without any evidence to support the same, that the insured sailor, Zimmerman, accepted his full pay, without his insurance premiums being deducted, knowing it to be such.

III. In holding that the sailor did not comply with the requirements of Navy Circular No. 1 of November 15, 1918 and No. 3 of January 13, 1919, and No. 14 of October 20, 1920 and Treasury Decision No. 48 of September 29- 1919 and that this brought about the

cancellation of his insurance contract when said circulars were not introduced in evidence in the Court below and no proof was submitted that they were ever shown to Zimmerman, and part thereof were not applicable and controlling in Zimmerman's status.

IV. In holding that the Court may assume that this sailor was advised that he should give his certified copy of his insurance application to the officer of the Pay Corps having his account when the sailor's service was active and continuous.

V. In holding that the insured sailor did not treat his written authorization to deduct premiums in his application for insurance as continuing in subsequent enlistments, since he wanted and needed the insurance during the war, there being no written request for cancellation of his policy and the insured being the possessor of a continuous service certificate.

VI. In holding that the insured sailor's War Risk Term Insurance was cancelled without his written request or notice to him thereof, there being money due him for active service pay at all times from the Government occupying a fiduciary relation to the sailor, from which to deduct the premiums as he had directed in his written application.

VII. In holding to a severely strict construction of the War Risk Insurance law and regulations when they should be construed liberally.

SUMMARY OF ARGUMENT

Your petitioner respectfully urges upon this Honorable Court that this Court should reverse the decision of the United States Circuit Court of Appeals for the Ninth Circuit and affirm the decision and judgment of the United States District Court for the District of Oregon in favor of the petitioner for the reasons hereinbefore and hereafter set forth:

(1) That the authorization for deduction of premiums from active service did not expire with the enlistment in which it was executed.

(2) That it was not necessary to have such authorization renewed and the Navy Paymaster had full authority and should have deducted the insurance premiums during the subsequent enlistments.

(3) That Zimmerman did not by any writing or otherwise revoke or cancel his policy of insurance or the authorization which he had given for deduction of premiums on his insurance from his active service pay and that the insurance policy in this case was in full force and effect and unterminated on the date of the death of Elias Melvin Zimmerman, then a boatswain's mate, while he was yet in the active service of the Navy on June 30, 1921.

(4) There was always active service pay due Zimmerman from the Government for his active service

from which to deduct the payments for premiums on his insurance authorized in his application without limit as to enlistment. (R. 55 C. C. A.-9 and 30 Sup. Ct.)

(5) That Zimmerman did not understand and there was no proof that he was ever notified that there was any law or regulation which would prevent the Government from deducting the premium as he had authorized and that Zimmerman wanted and needed insurance protection subsequent to his first enlistment since the war was still on and the Government had urged and insisted that soldiers and sailors take out insurance.

(6) That Zimmerman had a Continuous Service Certificate No. 49,689, having served over seven (7) years continuously in the Navy and that not only at the last of each month did he have pay due him enough to pay the premium on his insurance, but that at the time of his death when he was a boatswain's mate he had more than enough due him to pay all of his premiums which the Government had failed to deduct.

(7) The Circuit Court of Appeals of the Ninth Circuit has in this case adopted a rule of severely strict construction in direct conflict with the liberal rule announced by the Supreme Court of the United States and in conflict too with the more liberal rules of most other Courts, particularly in other cases coming under the War Risk Insurance Act.

ARGUMENT

ASSIGNMENT OF ERROR No. 1

This plaintiff and petitioner contends that the contract of insurance on the sailor's application did not expire with the enlistment in which it was made or his subsequent enlistments for the reason that:

(1) The enlistment contract applied to service only, while the contract of insurance, based upon the application therefor, was separate and distinct and made at a different time. (R. 36-42 C. C. A.-9 and 19-22 Sup. Ct.)

Mortex vs. United States 297 Fed. 485.
O'Neill vs. U. S. 32 Fed. (2nd Se.) 313.
Unger vs. U. S. (C. C. A.-10) 65 Fed. (2nd Se.) 946.

(2) There was no limit as to the time the contract of insurance should run stated in the application of the insured, which application was accepted by the Government, and there was no time limit upon the authorization to deduct premiums for the insurance. (R. 36-42 C. C. A.-9 and 19-22 Sup. Ct.)

(3) The insured sailor had a Continuous Service Certificate No. 39,689 and he had at the time of his death been serving for more than seven (7) years in the Navy of the United States from March 18, 1914 to the date of his death, June 30, 1921. (R. 54 C. C. A.-9 and 29 Sup. Ct.)

(4) When a sailor was discharged and left the service he could still keep up his insurance without a new application for contract of insurance and if he re-enlisted after being out of the service for sometime, all he needed to do was to present a certified copy of his insurance application and have his insurance continued..

See II War Risk Ins. Circulars No. 1 Navy Dept. Dated Nov. 15, 1918.

No. 3, Dated January 13, 1919.

No. 14, Dated October 20, 1920.

All by the Navy Department, Bureau of Supplies and Accounts.

ASSIGNMENT OF ERROR No. II.

This plaintiff and petitioner contends that the insured sailor did not accept his full pay without his insurance premiums being deducted knowing it to be such, for the following reasons:

(1) That there was no evidence in this case whatever to show that Zimmerman, the insured, knew that he was paid in full without his insurance premiums being deducted. either monthly or at the end of his enlistments.

(2) That Zimmerman's pay varied from time to time since he was making an allotment to his mother, which varied from time to time.

(3) That any purchases by the insured from the Ship Stores on board ship would be deducted from his pay, and that, too, would make the amount of the pay he himself received vary from time to time.

ASSIGNMENT OF ERROR No. III.

This petitioner and plaintiff contends that Circular No. 1 of the Navy Department, Bureau of Supplies and Accounts dated November 15, 1918 as amended by Circular No. 3 of January 13, 1919 and Circular No. 14 of October 20, 1920 and Treasury Decision No. 48 were not sufficiently applicable to and controlling in the case at bar to cancel and terminate the insurance of this sailor for the reasons that:

(1) Circular No. 1 of November 15, 1918 was not in effect and therefore could not apply to the re-enlistment of the insured on March 18, 1918.

(2) Considering this Circular No. 1 of November 15, 1918 to have been in effect on September 16, 1919 when the sailor re-enlisted a second time it provided in Paragraph 8 thereof as follows:

> "Checking of insurance premium will continue while a man is in a pay status or until the insurance is cancelled by written request over the man's signature forwarded to the officer of the Pay Corps carrying his account." (R. 98.)

(3) There was never a written request over Zimmerman's signature to cancel his insurance, and no

proof whatever of such request. (R. 53-58 C. C. A.-9 and 29-32 Sup. Ct.)

(4) That the discharge spoken of in Par. 11 of Navy Circular No. 3, January 13, 1919 referred particularly to men who left the service as it provided for payment of premiums *when the Government pay ceases* which Zimmerman's never did and it provided for the first remittance of premium by the insured *himself* and not through the Paymaster, unless he re-enlisted at a later date, (R. 98-99) and the Second Circuit Court of Appeals sets forth a part of Treasury Bureau of War Risk Insurance Form 2303 which stated:

> "After discharge from the service *when the Government pay ceases*, you should send check or money order drawn to the Treasurer of the United States, to the Disbursing Clerk, Bureau of War Risk Insurance, Treasury Department, Washington, D. C."

Sawyer vs. U. S. (C. C. A.-2) 10 Fed. (2d) 416.

(5) The officer of the Pay Corps already had the insured's pay account, and if the sailor continued in service as he did, the checkage would be continuous instead of a first checkage by the Paymaster. (R. 98.)

(6) That Treasury, Bureau of War Risk Insurance, Form 2303, containing information relative to com-

pensation and continuation of War Risk Insurance was intended to be filled out in duplicate in the event a sailor was finally discharged and went out of the service for sometime, and this applied too, to the certified copy of his insurance application, as it will be noted he was to be instructed to forward these papers direct to the Bureau of War Risk Insurance with his first remittance or premium, when the insured was out of active service and out of a pay status, but this did not apply to Zimmerman as he was always on a pay status and was never out of active service for a single day. (R. Par. 1-54 and Par. 2-55 C. C. A.-9 and Par. 4-29 and Par. 2-30 Sup. Ct.)

(7) That Treasury Decision No. 48 rendered on September 29, 1919 was not in effect on September 16, 1919 when the insured re-enlisted for a third term of service in the Navy, and not being in effect it was not controlling either at the time of his first re-enlistment or at the time of his second re-enlistment just as the Navy Department Circular of November 15, 1918 and January 13, 1919 were not in effect at the time of the insured's first re-enlistment and as contended by the petitioner were not applicable to the case at bar at the time of either re-enlistment on account of the insured's continuous service and being always in a pay status. However, Treasury Decision No. 48 provided that "authorization of deductions from the insured's pay shall be equivalent of tender," and the Navy De-

partment always had the sailor's unrevoked written authorization of deduction contained in his application for insurance. (R. 38-42 C. C. A.-9 and 19-22 Sup. Ct.)

(8) That War Risk Insurance Circular No. 14 issued by the Navy Department, Bureau of Supplies and Accounts, on October 20, 1920, although not in effect at the time of Zimmerman's second re-enlistment on September 16, 1919, provided:

> "The attached War Risk circular letter shall be effective upon receipt thereof except in case of term insurance which is now in effect."

It also stated that:

> "The responsibility for the proper execution of application for Government insurance rests upon commanding officers and commandants."

It also provided that:

> "When term insurance is cancelled or reduced except in conversion (but there is no conversion in this case) a request signed by the insured must be made in duplicate and addressed to the Bureau of War Risk Insurance through the supply officer carrying the insured's pay account."

and there was never any such request signed by the insured sailor. Said War Risk Insurance Circular No. 14 also provided: that upon final discharge "he shall be instructed to forward Treasury Form 2303 to the

Bureau of War Risk Insurance with the first remittance of premium by him," but it will be noted this does not apply to a man like Zimmerman who was continuing actively in the service.

(9) However, it is to be noted that War Risk Insurance Circulars Nos. 1, 3, and 14 of the Navy Department and Treasury Form 2303 were none of them admitted in evidence by stipulation or in any other way and no proof that they were ever shown to the sailor, Zimmerman. (R. 56 C. C. A.-9 and 30-31 Sup. Ct.)

(10) Attention is called to the provisions of Sec. 13, Chapter 105 (40 Statute at Large 399 and 555) which provide that the Director of the War Risk Insurance Bureau and the Secretary of the Treasury Department could make regulations under the Insurance Act, and surely the Navy Department could not issue regulations that would deprive Zimmerman of his rights under his contract with the Government.

(11) Furthermore, Treasury Decision 48 of September 29, 1919, which incorporated Treasury Decision 33 of September 20, 1918, and in full force and effect provided "insurance will not be permitted to lapse for non-payment of premiums *while the insured is in the active, military, or naval service* and premiums therefor are authorized to be deducted from the insured's pay or deposits."

ASSIGNMENT OF ERROR No. IV.

This petitioner and plaintiff contends that the Circuit Court of Appeals should not have assumed that the insured was advised that he should give a certified copy of his insurance application to the officer of the Pay Corps taking up his accounts, which assumption was based upon the presumption of the performance of official duty (R. 99) for the following reasons:

(1) That the officer of the Pay Corps no doubt considered, and rightly so, that the insured did not come under the provisions of the Navy Department Circular of November 15, 1918 as amended by the Circular of January 13, 1919, since the sailor was in continuous active service, and that checkage of his insurance premiums on term insurance should continue on the payroll while he was in a pay status and this is supported by War Risk Insurance Circular issued by Navy Department, Bureau of Supplies and Accounts on November 21, 1919 after Zimmerman's second reenlistment on September 16, 1919, wherein it is stated in Paragraph One (1) thereof that:

> "Bureau of War Risk Insurance reports that numerous supply officers are registering Form 6 allotments in payment of premiums on term insurance. Attention is called to War Risk Circular No. 1 instruction in which read:
>
> That premium for term insurance be charged by checkage on the payroll by the supply officer

carrying the pay account of the insured."

Also

Par. 1 and 4 War Risk Ins. Circular No. 2, Navy Dept. dated December 19, 1918.

(2) Thus the presumption of the performance of official duty is not always a substantial basis for the assumption that certain acts have been done, for it is a well known fact that many duties are not performed through inadvertance, mistake or otherwise.

ASSIGNMENT OF ERROR No. V.

This petitioner and plaintiff contends that the insured sailor having confidence in his written application and his Government, did treat his authorization to deduct premiums as continuing during his subsequent enlistments for the reasons that:

(1) The sailor made his application for insurance and his written authorization to deduct premiums therefor on December 3, 1917 when he knew the time of the enlistment, he was then serving would expire on March 17, 1918, just three and one-half months later and so he expected his term insurance to continue in his next enlistments, as the war was still raging, the premium rate of $6.50 per month being low, and he wished to provide for his mother. (R. 36-42 C. C. A.-9 and 19-22 Sup. Ct.)

Bulletin No. 1 War Risk Insurance Bureau issued

October 15, 1917, ander authority of Section 13 and the direction contained in Section 402 War Risk Insurance Act provided that the Government

> "hereby insures from and after the.....day of....., 19....., John Doe of Illinois, Private Co. A, Third Infantry, conditioned up the payment of premiums as herein provided"

and there was no limit to any one enlistment. Said bulletin also provided that:

> "premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him from the United States or deposited by him with the United States and, if so to be deducted a premium when due will be treated as paid whether or not such deduction is in fact made, if upon the due date the United States owe him on account of pay or deposit an amount sufficient to provide the premium"

and there was no limit as to any one enlistment and Zimmerman in his application for insurance, signed December 3, 1917, which was a part of his contract with the Government, provided by Section 202, War Risk Insurance Circular, stated specifically

> "I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States in payment of the premiums as they become due, unless they be otherwise paid"

and it is to be noted there was no limit in such authorization to any one enlistment, and there was no authority to pay the premiums otherwise.

(2) The insured never gave any written request whatever over his own signature to revoke his application or to cancel the insurance and there was no evidence whatever of such written request and premiums should have been paid from pay due him. (R. 53-58 C. C. A.-9 and 29-32 Sup. Ct.)

On July 31, 1933 the Tenth Circuit Court of Appeals held that:

> "'Under authority contained in application, not revoked in writing, premiums of War Risk Policy on insured's re-enlistment within three months, after discharge should have been deducted from pay and paid."
>
> *Unger vs. U. S.* (C. C. A.-10) 65 Fed. (2nd Se.) 946.
>
> *Mortex vs. United States* 297 Fed. 485-488.
>
> *O'Neill vs. U. S.* 32 Fed. (2nd Se.) 313.

(3) The sailor having filed his application for insurance with the Government and having authorized in such written application the deduction from his pay of premiums therefor, which application, premium, and contract the Government had accepted, the sailor felt confident that this insurance was continued and particularly since he was in continuous active service with a certificate to that effect and these policies and,

the law generally are entitled to the most liberal construction in favor of the soldier or sailor.

U. S. vs. Cox (C. C. A.-5) 24 Fed. (2d) 799.

(4) That the sailor being in continuous service during the period of 7 years 3½ months, it was the duty of the officers of the Navy to see that his insurance was kept alive by the deduction of premiums from his pay as he authorized them to do, or to have advised him that his insurance was lapsing because of failure to pay the premiums, and there is no evidence whatever to show that they did this as the regulations required them to do as Par. 4 War Risk Insurance Circular No. 1, Navy Dept., Bureau of Supplies and Accounts, dated November 15, 1918, provided that:

> "The responsibility for the proper checkage of insurance premiums rests on the officer of the Pay Corps carrying the account against which the premium is to be charged"

and so the sailor, Zimmerman, felt satisfied that his insurance was continued.

Railway Mail Assoc. vs. Moore 15 Fed. (2d) 547.

(5) That premiums were not paid on this policy was not the fault of the insured or the beneficiary as it is admitted that the Government had at all times in its possession from the time the policy was in effect to the date of the death of the insured, then a boatswain's

to pay the premiums due on the policy. (R. Par. 2-55 C. C. A.-9 and Par. 2-30 Sup. Ct.)

O'Neill vs. U. S. 32 Fed. (2nd Se.) 313.
U. S. vs LaPage (C. C. A.-1) 59 Fed.)2d) 167-168.

ASSIGNMENT OF ERROR No. VI.

Your petitioner and plaintiff contends that the Circuit Court of Appeals erred in holding that the insured sailor's War Risk Term Insurance was cancelled without his written request for the following reasons:

(1) The regulations provided "checkage must be made on the Navy Pay Roll of premium for every application for insurance executed by officers or men of the Navy. *Checkage of insurance premium will continue while a man is in a pay status* or until the insurance is cancelled by written request over the man's signature forwarded through the officer of the Pay Corps carrying his account." (R. Sec. 8, 98.)

Par. 8, Navy Dept. War Risk Insurance Circular No. 1, dated Nov. 15, 1918, Bureau of Supplies and Accounts.

(2) A further and later regulation provided that

"When term insurance is cancelled a request signed by the insured must be made in duplicate and addressed to the Bureau of War Risk Insurance via the Supply Officer carrying his pay account."

See "'Cancellation" in War Risk Ins. Circular No. 14 of Navy Dept., Bureau of Supplies and Accounts, dated Oct. 20, 1920.

(3) The case of *Sawyer vs U. S.* 10th Fed. (2d) 416, decided against the benificiary by the Second Circuit Court of Appeals has been quoted as in accord with the ruling of the Ninth Circuit Court of Appeals in this case, but while it was a Navy case it is not at all like this case at bar for the reason that Sawyer had been *finally* discharged from active service in the Navy with no active service pay due him and he was in the reserve where he had to look after his own insurance and he allowed his premiums to be in default, an entirely different status than that of Zimmerman, the sailor, in this case who had continuous active service and he died in that status with pay always due him sufficient to pay his premiums.

Also the case of *U. S. vs. Barry* 67 Fed. (2d) 763 decided against the beneficiary by the Sixth Circuit Court of Appeals, has been quoted as in accord with the decision of the Ninth Circuit Court of Appeals in this case, but it is not like this case at bar for the reason that in that case Barry had been promoted to be an officer whereupon he made special allotments, was finally discharged with no active service pay due him and he allowde his premium payments to default, an entirely different status than that of Zimmerman,

the sailor in this case, who had continuous active service as an enlisted man, being boatswain's mate at the time of his death, and having pay always due him.

In the case of *Crawford vs. U. S.* 291 Fed. Page 801-805, sometimes referred to as in accord with the decision of the United States Circuit Court of Appeals for the Ninth Circuit, it is to be particularly noted that while this was a case of a sailor in the Navy, Chawford had been discharged from active service and became a member of the United States Naval Reserve and had "retainer" pay coming to him but not active service pay. In this case too, he had been *released and finally discharged from active service* and fully paid for all services rendered including a Sixty ($60:00) Dollar bonus and he was given a written notice, War Risk Insurance Form 2303, which notice advised him that *when his government pay ceased* he should send his insurance premium by check or money order to the Secretary of the Treasurer of the United States promptly on the 1st of each month, otherwise his insurance would become void, while in this case of Zimmerman's the sailor was never finally released or discharged from active service and his *Government active service pay never ceased* during the whole of more than 7 years service in the avy until the date of his death, June 30, 1921.

ASSIGNMENT OF ERROR No. VII.

This petitioner and plaintiff further contends that the United States Circuit Court of Appeals for the Ninth Circuit has followed a severely strict construction of law and regulations instead of construing the law and regulations liberally in favor of the insured so as not to work a forfeiture, annulment or lapse of the insurance policy for the reasons that:

(1) The very purpose of the Congress in passing the War Risk Insurance Act was "to give insurance to those who entered the military and naval service and to protect those who were dependent upon them", and further the Eighth Circuit Court of Appeals has stated "great latitude should be allowed in order to give effect to the acts and intentions of those in military service in time of war", for surely the Government should keep faith with its dead.

Helmholz vs. Horst (C. C. A.-6) 294 Fed. 417-420.

Johnson vs. White (C. C. A.-8) 39 Fed. (2d) 797.

(2) In the first place the regulations issued through its War Risk Insurance Circulars, Bureau of Supplies and Accounts, by the Navy Department, following the sailor's application for insurance and his authorization for the payment of premiums therefor were too complex and intricate for a sailor to follow

and were in fact often misunderstood and improperly carried into effect by the officers themselves as shown in Paragraph 1 of Assignment of Error No. IV, hereinbefore set forth.

See War Risk Ins. Circular No. 2, Navy Dept., Bureau of Supplies and Accounts, dated Dec. 19, 1918.

War Risk Ins. Circular, Navy Dept., Bureau of Supplies and Accounts, dated Nov. 21, 1919.

(3) The Supreme Court of the United States has adopted a rule of liberal construction in War Risk Insurance Acts.

White vs. U. S. 270 U. S. 175, 46 Supreme Court Reports 274, 70 Law Edition 530.

(4) The Circuit Court of Appeals for the Ninth Circuit in the case at bar has in reversing the judgment of the District Court for the District of Oregon adopted a rule of severely strict construction directly in conflict with the liberal rule announced by the Supreme Court and other Circuit Courts of Appeals.

U. S. vs. Cox 24th Fed. (2d) 799.

Johnson vs. White (C. C. A.-8) 39 Fed. (2d) 793.

U. S. vs. Tyrakowski (C. C. A.-7) 50 Fed. (2d) 766.

U. S. vs. Perry (C. C. A.-8) 55 Fed. (2d) 819.

U. S. vs. Lesher (C. C. A.-9) 59 Fed. (2d) 53.

(5) It surely should not be the policy of the Navy Department, Bureau of Supplies and Accounts, to make rules and regulations to break contracts which the sailor had entered into with the Government in good faith and the present decision of the Ninth Circuit Court of Appeals surely lends itself to that proposition, and this should not be the policy of the Courts, particularly since the sailor is in a confidential relation with his Government and in a sense a ward of the Government.

The First Circuit Court of Appeals says:

> "The Government extended to those in the service during the World War every possible benefit and encouragement to protect themselves and their family against want—in case of their death or disability while in the service. *The Government should not stand on narrow technicalities* when the good faith of the parties is unquestioned."

U. S. vs. LaPage (C. C. A.-1) 59 Fed. (2d) 167.

O'Neill vs. U. S. 32 Fed. (2d) 313.

(6) The rule is that Courts do not favor a forfeiture, and when doubts arise as to the proper construction of an insurance contract, that view should be adopted which is most favorable to the insured and will prevent annulment and lapse of his policy.

Hartford Life and Annuity Insurance Co., vs. Unsell, 144 U. S. 539; 36 La. Ed. 500.

Insurance Co. vs. Eggleston, 96 U. S. 572; 24 La. Ed. 845.

Thompson vs. Insurance Co., 104 U. S. 260; 26 L. Ed. 768.

CONCLUSION

WHEREFORE, your petitioner and plaintiff in this case at bar urges upon this Honorable Court, the final arbiter of these important and far reaching questions that will effect so many widowed mothers and other needy relatives of deceased World War Veterans, a reversal of the decision of the United States Circuit Court of Appeals for the Ninth Circuit and an affirmance of the judgment of the United States District Court for the District of Oregon holding:

1) That the contract for insurance on the sailor, Zimmerman's application did not expire with the enlistment in which it was executed or his subsequent re-enlistment.

(2) That the authorization for deduction of premiums from active service pay did not expire with the enlistment in which it was executed or his subsequent re-enlistment and it was not necessary to have such authorization, unlimited as to time, renewed upon each subsequent continuing re-enlistment.

(3) That Zimmerman had a Continuous Service Certificate No. 49-689, having served

continuously in the Navy without missing a single day for over seven years.

(4) That the sailor, Zimmerman, always had *active service pay due him sufficient to pay the premium* on his insurance and that at the time of his death he had *more than enough active service pay* due him to pay accrued premiums, which the Government failed to deduct.

(5) That Zimmerman did not by writing or otherwise revoke or cancel his policy of insurance or the unlimited authorization which he had given for deduction of premiums on his insurance from his active service pay, and that he wanted and needed the insurance and did not understand that there was any law or regulation that would prevent the Government from deducting the premium as he had authorized or that the Government could cancel his contract for insurance without due notice to him.

(6) That the Navy Pay Master had full authority and should have deducted the insurance premium during the subsequent enlistments.

(7) That the Insurance Policy in this case together with the authorization to deduct premiums from his *active service pay* were in full force and effect and unterminated on the date of the death of Elias Melvin Zimmerman, while he was still in the *active service* of the Navy on June 30, 1921 when he together with all others on board the U. S. S. Conestoga went down to their eternal sleep in the great Pacific and the beneficiary, Bertha Meyer Smith, the deceased

sailor's widowed mother, should be paid the amount due on his War Risk Insurance Policy.

Respectfully submitted,

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